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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/812,882	03/31/2004	Michael A. Porzio	249287US40	4558

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EXAMINER	
EBRAHIM, NABILA G	

ART UNIT	PAPER NUMBER
1618	

NOTIFICATION DATE	DELIVERY MODE
05/21/2007	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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Office Action Summary	Application No.	Applicant(s)	
	10/812,882	PORZIO ET AL.	
	Examiner	Art Unit	
	Nabila G. Ebrahim	1618	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *20 February 2007*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-4,6,7 and 12-14* is/are pending in the application.

4a) Of the above claim(s) *5, 8-11, 15-41* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-4,6,7 and 12-14* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Election/Restrictions

1. Applicant's election with traverse of claims Group I, claims 1-14, and election of composition (b), and species of pectin and corn syrup solids in the reply file on 2/20/07 is acknowledged.

Accordingly, claims 1-4, 6, 7 and 12-14 are under current examination. The traversal is on the ground(s) that Group I recite that composition is made by the method recited in the claims of Group III, accordingly, the burden has not been met. This is not found persuasive because Group II is directed to a product by process claims which reads mainly on the product. The product can be made by an alternative method other than the method claimed in Group III such as molds or by encapsulating the flavor by admixing or injecting into the molten center, rather than as claimed. As far as the argument for groups II and I, applicant contends that the analysis used is incorrect but does not state any reasons for this contention. Accordingly, the requirement is still deemed proper and is therefore made FINAL.

Claims 5, 8-11, 15-41 are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected invention and species.

Claim Rejections - 35 USC § 102

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

2. Claims 1-4, 6, 7 and 12-14 are rejected under 35 U.S.C. 102(b, e) as being anticipated by Porzio US 6652895.

The claims in the prior reference appear to contain the same components of compositions of the present application. Porzio teaches an encapsulation composition comprising an encapsulate (flavor, drug, vitamin, etc) encapsulated in a glassy matrix comprising pectins such as low methoxy pectin(s), (calcium-reactive food polymers), OSAN modified starch, gum Arabic (calcium-insensitive), corn syrup solids and a calcium salt. The amounts recited in instant claims 1 are anticipated by the reference (col. 4, lines 18-44). Inherently each of the food polymers would have been anticipated to have their own glass transition temperatures because same compounds have same properties. The applied reference has a common inventor with the instant application. Based upon the earlier effective U.S. filing date of the reference, it constitutes prior art under 35 U.S.C. 102(e). This rejection under 35 U.S.C. 102(e) might be overcome either by a showing under 37 CFR 1.132 that any invention disclosed but not claimed in the reference was derived from the inventor of this application and is thus not the invention "by another," or by an appropriate showing under 37 C'FR 1.131.

3. Claims 1-4, 6, 7 and 12-14 are rejected under 35 U.S.C. 102(b) as being anticipated by Porzio (6,187,351).

The claims in the prior patent appear to contain the same components of compositions of A comprising composition B (b) of the present application. In this case two food polymers are contemplated in the claims (methoxypectin and gum arabic), corn syrup solids and a calcium salt. Each of the food polymers would have been

anticipated to have their own glass transition temperatures and their values are expected to be the same as the instant claims values because same compounds have the same properties.

4. Claims 1-4, 6, 7 and 12-14 are rejected under 35 U.S.C. 102(b) as being anticipated by Porzio (5,897,897) or (5,603,971).

Porzio discloses an encapsulation composition to encapsulate flavors, medications, pesticides, etc. The claims in the prior patent appear to contain the same components of the composition including composition B (b) of the present application (pectin, gum Arabic, calcium salt and corn syrup solids). In this case at least two food polymers (calcium-reactive and calcium insensitive) are contemplated in the claims. Each of the food polymers would have been anticipated to have their own glass transition temperatures.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not

commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 1-4, 6, 7 and 12-14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Merritt et al 4515769 (Merritt), in view of Cherukuri US publication 20010048965 (Cherukuri).

Merritt disclosed is an encapsulation composition (col.5, lines 33-42) of essential oil, in a matrix of gum Arabic, with gelatin. The gelatin, gum Arabic are shown as of equal weight in non-limiting examples, 50% each based on the matrix weight, absent encapsulate (col. 7, top). Example 4 shows a matrix of over 50% gum Arabic, with a water, glycerol (col.7, top). Also to be added, if desired are corn syrup solids and sugar (sucrose, examples 5 and 6). Cinnamon oil is encapsulated (co1.8, line 6). The glass transition temperature was not stated, but since the composition of the matrix is as instantly claimed, the glassy matrix, otherwise not defined of the instant claims, would be the same.

Merritt did not disclose the calcium sensitive polymers and the calcium salt.

Cherukuri teaches confectionery compositions and nutritional bars containing the alternate encapsulation products (abstract). The reference teaches a process to encapsulate flavors, sweeteners, colors, medicaments, vitamins, and minerals. The encapsulation composition comprises pectin [0081, and example 24] and calcium salts [0045, and 0046]. The composition may be in glassy condition [0067]

Accordingly, it would have been obvious to one of ordinary skill in the art at the time the invention was made to combine the knowledge of Merritt using a matrix of Arabic gum and corn syrup solids to the glassy matrix disclosed by Cherukuri because Cherukuri teaches that the encapsulated product of the inventive subject matter has a uniform active ingredient content and may be strong enough to withstand mechanical pressure both in the processing of the product, and in the chewing of the product in the mouth so that the active ingredients are released in the stomach [0038]. The expected result would be an encapsulate comprising pectin, gum, calcium salt, and corn syrup solids to encapsulate flavors, vitamins, minerals, and other ingredients.

Double Patenting

5. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-4, 6, 7 and 12-14 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-4, 6-7, 11-20 of copending Application No. 10/812883. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims in the prior application appear to contain the same components of compositions comprising pectin, gum Arabic, and corn starch syrup recited in the present application. Given the fact that there are more components in the prior application, one of ordinary skill in the art would expect the components to have more than one glass transition temperatures.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claims 1-4, 6, 7 and 12-14 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-11 of U.S. Patent No. 6,652,895. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims in the prior application appear to contain the same components of compositions (pectin, carboxymethylcellulose, calcium salt, and corn syrup solids). Given the fact that there are more components in the prior application, one of ordinary skill in the art would expect the components to have more than one glass transition temperature. The composition encapsulates flavors, medications, etc.

Claims 1-4, 6, 7 and 12-14 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-4, 13-20, 23-32, 34, 35, 44-55, 57-62 of U.S. Patent No. 6187351. Although the conflicting claims are

not identical, they are not patentably distinct from each other because the claims in the prior application appear to contain the same components of compositions (different types of gum, pectin, calcium salt and corn syrup solids) of the present application. In this case at least two food polymers are contemplated in the claims. Each of the food polymers would have been anticipated to have their own glass transition temperatures.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Nabila G. Ebrahim whose telephone number is 571-272-8151. The examiner can normally be reached on 8:00AM-5:00PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Hartley can be reached on 571-272-0616. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Nabila Ebrahim
5/7/07

MICHAEL G. HARTLEY
SUPERVISORY PATENT EXAMINER

Notice of References Cited	Application/Control No. 10/812,882	Applicant(s)/Patent Under Reexamination PORZIO ET AL.	
	Examiner Nabila G. Ebrahim	Art Unit 1618	Page 1 of 1

U.S. PATENT DOCUMENTS

*		Document Number Country Code-Number-Kind Code	Date MM-YYYY	Name	Classification
*	A	US-6,652,895	11-2003	Porzio et al.	426/96
*	B	US-6,187,351	02-2001	Porzio et al.	426/96
*	C	US-5,897,897	04-1999	Porzio et al.	426/96
*	D	US-5,603,971	02-1997	Porzio et al.	426/96
*	E	US-4,515,769	05-1985	Merritt et al.	424/49
*	F	US-2001/0048965	12-2001	Cherukuri, Subraman Rao	426/660
	G	US-			
	H	US-			
	I	US-			
	J	US-			
	K	US-			
	L	US-			
	M	US-			

FOREIGN PATENT DOCUMENTS

*		Document Number Country Code-Number-Kind Code	Date MM-YYYY	Country	Name	Classification
	N					
	O					
	P					
	Q					
	R					
	S					
	T					

NON-PATENT DOCUMENTS

*		Include as applicable: Author, Title Date, Publisher, Edition or Volume, Pertinent Pages)
	U	
	V	
	W	
	X	

*A copy of this reference is not being furnished with this Office action. (See MPEP § 707.05(a).)
Dates in MM-YYYY format are publication dates. Classifications may be US or foreign.